LINA SOO

v.

NGU CHU HIONG & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN JC
[DIVORCE PETITION NO: KG9-1991]
8 JULY 2003

CIVIL PROCEDURE: *Parties - Striking out of - Appeal - Deputy registrar allowed application to strike out name of deceased co-respondent in divorce petition - Whether application should have been allowed in light of stay order - Whether stay order did not stay all proceedings - Whether stay order did not affect party struck out - Rules of the High Court 1980, O. 15 r. 6(2)(a)*

The petitioner filed a divorce petition on the ground that the respondent had committed adultery with the co-respondent and claimed damages against the latter. Subsequently, the co-respondent passed away and the letters of administration were issued to her mother ('the administrator') who applied to amend the petition by striking out the name of the co-respondent. The deputy registrar ruled in favour of the administrator. Hence, the petitioner's appeal. On the hearing of the appeal, the petitioner sought to add the administrator as a party to the petition in place of the co-respondent ('the said application'). That was dismissed by the court upon the preliminary objection of the administrator that it was not the proper forum for the petitioner to make the said application. When the appeal came up again for hearing before this court, the petitioner raised a preliminary point for the court to determine, *ie*, whether the said application was a proceeding for all intents and purposes as there was a court order for stay of proceedings in the action ('stay order').

Held:

[1] Based on the Court of Appeal case of *Harkness v. Bell's Asbestos and Engineering Ltd*, the said application was a "proceeding". However, that did not mean that the stay order stayed all proceedings and that no further proceedings could be taken. (p 767 e)

[2] A stay of proceedings puts a stop or "stay" on the further conduct of the proceedings in that court at the stage which they have reached, so that all parties are precluded thereafter from taking any further step in the proceedings. However, a stay of proceedings is not the equivalent of a judgment or of a discontinuance, and may be removed if proper grounds are shown, even if the stay is imposed by a consent order. In the case of a stay, whether conditional or absolute, the action still subsists and is still pending. The stay is always potentially capable of being removed. (pp 767 g-h & 768 a)

[3] Despite the stay order, the court had the jurisdiction to entertain the application of the administrator to strike out the name of the co-respondent under O. 15 r. 6(2)(a) of the Rules of the High Court 1980. Further, the stay order referred to the respondent and not the co-respondent and therefore, the stay order was operative only against the respondent. The administrator was not precluded from applying to strike out the name of the co-respondent from the divorce petition. (p 769 a-b)

[Preliminary point raised by petitioner as per the said application was dismissed.]

Case(s) referred to:
Harkness v. Bell's Asbestos and Engineering Ltd [1967] 2 QB 729 ***(foll)***
ROFA Sport Management AG & Anor v. DHL International (UK) Ltd & Anor [1989] 2 All ER 743 ***(foll)***

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, rr. 3, 91(1)(b)
Rules of the High Court 1980, O. 1 r. 4, O. 15 r. 6(2)(a), O. 23 r. 1, O. 56 r. 1, O. 92 r. 4

Rules Supreme Court [UK], O. 2 r. 1, O. 15 r. 6(2)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 37, paras 437, 438
William C Burton, *Legal Thesaurus*, Regular Edition

For the petitioner - Ernest Chua; M/s Ernest Chua & Co
For the co-respondent - Jammie Tai; M/s Tang & Partners

Reported by Usha Thiagarajah

JUDGMENT

Lau Bee Lan JC:

Background

This matter emanates from a notice of appeal to judge in chambers pursuant to O. 56 r. l of the Rules of the High Court 1980 ("RHC") filed by the petitioner (encl. 224). The petitioner, Lina Soo, has appealed against the decision of the learned deputy registrar dated 22 July 2002 in allowing the application of the administrator of the estate of the co-respondent to strike out the name of Irene Chong Oi Khium as the co-respondent in the petition (encl. 221A).

Looking at the records of proceedings, this case has a jagged history. It would be pertinent to state the brief facts of the case so as to appreciate the context of the preliminary point raised by Mr. Ernest Chua, counsel for the petitioner which will be adverted to hereinafter.

The salient facts of the case are as follows:

1. 25 January 1991 – Lina Soo, the petitioner, filed the divorce petition on the ground that the respondent had committed adultery with the co-respondent and claimed damages against the latter. Prior to this the petitioner and the respondent were judicially separated pursuant to a court order dated 14 June 1986.

2. 12 November 1992 – The respondent filed an application *vide* a summons in chambers for an order that the proceedings arising from the prayer for dissolution of marriage be stayed and that the respondent be at liberty to proceed on the prayer in his answer as an undefended suit (encl. 63)

3. 28 March 1994 – The respondent's application was dismissed with costs to the petitioner (encl. 95).

4. 2 November 1998 – The petitioner filed an application to vary the order of court dated 14 June 1989 for an increase of the monthly maintenance to RM3,000 from RM1,500 (encl. 132). The court granted the application with effect from 2 November 1998 (encl. 150). The respondent appealed to the Court of Appeal.

5. 28 May 1999 – The petitioner filed an application for stay of all proceedings in the petition until further order and the respondent do pay into court a sum of RM60,000 or such sum as the court deems fit as security for costs within thirty (30) days from the date of the order (encl. 173).

6. 1 July 1999 – Two notices of taxation were heard by the learned deputy registrar namely, dated 29 April 1999 (encl. 167) and 11 May 1999 (encl. 170) which were related to the cost contained in the court orders of 28 March 1994 and 20 February 1999 respectively.

7. 17 September 1999 – The learned deputy registrar ruled that the notices of taxation be adjourned for taxation after the conclusion of the action. (It is to be noted that the deputy registrar ruled on the two notices of taxation before the order of the learned judge on 18 September 1999). The petitioner appealed (encl. 185).

8. 18 September 1999 – The court ordered that all proceedings in the action (encl. 173) be stayed until the respondent paid the costs to the petitioner in respect of court orders dated 28 March 1994 and 20 February 1999 with a further order that the respondent pay RM30,000 into court or furnish security for costs in the proceedings (encl. 188).

9. 21 January 2000 – The appeal lodged by the petitioner to the judge in chambers against the decision of the learned deputy registrar was dismissed with costs to the respondent (encl. 197).

It is pertinent to note that the petitioner has appealed to the Court of Appeal against the order of the judge made on 21 January 2000 but there is no appeal lodged against the order for stay of proceedings granted on 18 September 1999.

Against this backdrop, in the interim, the co-respondent passed away on 19 December 2000 and letters of administration was issued to her mother, Liaw Ah Kee. Mdm. Liaw Ah Kee, as the administrator of the estate of the co-respondent therein applied on 3 September 2001 for an order that the petition dated 25 January 1991 be amended by striking out the name of the co-respondent and that there be no order as to costs. This was heard by the learned deputy registrar who ruled in favour of the administrator of the estate of the co-respondent. Hence the appeal by the petitioner as per the notice of appeal contained in encl. 224.

The hearing of the appeal (encl. 224) was fixed on 28 February 2003. On the said date before my predecessor, Miss Jammie Tai, counsel for the administrator of the estate of the co-respondent raised a preliminary objection (encl. 229) on the ground that the notice of appeal to judge in chambers dated 23 July 2002 is not the correct forum for the petitioner to make the application for Liaw Ah Kee, the administrator of the estate of the co-respondent a party to the petition in place of the co-respondent. On 1 April 2003 my predecessor ruled that the preliminary objection be allowed with no order as to costs.

Following the disposal of the aforesaid preliminary objection raised in respect of encl. 224, the hearing of the appeal proper was fixed on 11 June 2003.

On 11 June 2003, when the matter was before me, the learned counsel for the petitioner, urged the court to determine a preliminary point before proceeding with the hearing of the appeal on its merits. The preliminary point raised by the learned counsel is whether the application by the petitioner for the administrator of the estate of the co-respondent, namely, Liaw Ah Kee to be made party to the petition in place of the co-respondent, Irene Chong Oi Khium, is a "proceeding" for all intents and purposes as there is a pending court order for stay of proceedings in this action granted by the court on 18 September 1999 (hereinafter referred to as "the said application").

Contentions Of Counsel

Learned counsel for the petitioner submitted that the said application is a "proceeding" premised on the Court of Appeal case of *Harkness v. Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729. The court's attention was drawn to the dictum of Lord Denning MR at p. 730 para D as follows:

> R.S.C., Ord. 2 r. 1, does away with the old distinction between nullities and irregularities and should be construed widely and generously to give effect to its manifest intentions ... Every omission or mistake in practice or procedure is to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. ... **Any application to the court, however informal, is a "proceeding"**. ... (emphasis added)

Opposing that view, learned counsel for the late co-respondent submitted that the said application should not be allowed. Her reasons are – (a) the order of the court dated 18 September 1999 operated only as against the respondent to pay costs into court and effectively does not stay proceedings as between the petitioner and the co-respondent; and (b) alternatively, even if the proceeding is stayed, the parties can still make an application under O. 15 of the RHC.

Learned counsel contended that by analogy, a person or party may apply and cease to be a party even after the stay of proceedings based on the following quotation from the Malaysian Court Forms in Civil Proceedings vol. 5 (23007):

> **But in the case of a stay, the action still subsists, and the order operates to impose a restriction upon further proceedings being taken in the action.** Indeed, the word 'stay' in an order of the court should no longer be treated in itself as the final termination of the proceedings, and as the equivalent of a dismissal or discontinuance, even if the order be made by consent of the parties, **since the proceedings which are stayed still remain in being and remain pending, so that, for example, a person or party may apply to be added as a defendant after the stay of proceedings by consent.**

Therefore learned counsel argued that the administrator of the estate of the co-respondent can apply to the court to amend the petition by striking out the name of the late co-respondent.

In reply, learned counsel for the petitioner submitted that an order for stay of proceedings affects all parties concerned and not only against the respondent as such; and that is the reason why the petitioner has appealed against the whole decision.

Findings And Evaluation Of Court

It would be pertinent at this stage to reproduce the application of the petitioner in respect of the stay in encl. 173 which reads:

> (1) That all proceedings in this Petition be stayed until further order; and
>
> (2) That the Respondent do pay into Court or to the Petitioner's Solicitors a sum of RM60,000.00 or such sum as the Court deems fit as security for costs within 30 days from the date of the Order (hereinafter referred to as "the Stay Application")

The petitioner instituted the stay application pursuant to r. 91(1)(b) of the Divorce and Matrimonial Proceedings Rules 1980 ("the Divorce and Matrimonial Rules"), O. 23 r. 1 and O. 92 r. 4 of the RHC.

It is noted to be that the word "proceeding" appearing in r. 91(1) of the Divorce and Matrimonial Rules and in O. 23 r. 1 and O. 92 r. 4 of the RHC has not been defined specifically in the interpretation provision ie, r. 2 of the Divorce and Matrimonial Rules or definitions provision ie, O. 1 r. 4 of the RHC. In view of that, going by the ordinary meaning of the word, it means "actio, action at law, case, cause, conduct of a lawsuit, course of an action at law, dispute, hearing, lawsuit, legal action, legal procedure, litigation, matter, performance, prescribed method of action, prescribed mode of action, procedure, process,

prosecution, series of events, step, steps in the prosecution of an action, suit, suit at law, transaction, trial, undertaking." (see p. 403 of *Legal Thesaurus*, Regular Edition, William C. Burton).

In *Harkness*' case *(supra)*, the plaintiff, T.W. Harkness was employed as a boiler and pipe coverer for 24 years. His work brought him into contact with asbestos and he suffered asbestosis. In 1961 he left his employment. He wanted to bring an action against his employers for not supplying him with the proper mask or protective clothing. In order to circumvent the time-bar under the Limitation Act of 1939 and 1954, the plaintiff's solicitor made an application for leave which was granted by the district registrar without any oral hearing. The plaintiff's solicitor issued a writ on 17 April 1964. In the meantime there were negotiations for a settlement. The defendants discovered two flaws in respect of jurisdiction and form and applied to a judge in chambers to set the proceedings aside. The judge made no order as he considered that the order of the registrar was a nullity. The plaintiff's solicitor being in a quandary due to the time-limit of 12 months running from the time of discovering the material facts, applied to another judge to rectify the registrar's order and have it treated as valid under the new RSC O. 2 r. 1. The judge held that he could not do anything to rectify the flaws and the solicitor for the plaintiff appealed to the Court of Appeal.

In dealing with one of the arguments that RSC O. 2 r. 1 did not cover the case, His Lordship, Lord Denning MR at p. 735 para A-D said:

> I think this is far too narrow an interpretation. This rule should be construed widely and generously to give effect to its manifest intentions. *I think that any application to the court, however informal, is a "proceeding." There were "proceedings" in being at the very moment that the plaintiff made his affidavit and his solicitor lodged it with the registrar.* (emphasis added)

RSC O. 2 r. 1 in the case of *Harkness* is in *pari materia* with O. 2 r. l of the RHC and reads:

> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

In relation to the mode of making applications, the opening words of r. 91 of the Divorce and Matrimonial Rules provides that "Except where the Rules (Divorce and Matrimonial Rules) or any rules applied by these Rules, otherwise provide, every application in the matrimonial proceedings:

(a) shall be made to a registrar;

(b) shall if the proceedings are pending in the High Court, be made by summons, ...

As to the meaning of "Application of other rules", r. 3 of the Divorce and Matrimonial Rules provides:

(1) *Subject to these Rules and to any other written law,* the Subordinate Courts Rules 1980 and the *Rules of the High Court 1980 shall apply with necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceeding pending* in the Sessions Court and *in the High Court* respectively.

(2) *For the purposes of paragraph (1), any provision of these Rules authorising or requiring anything to be done in matrimonial proceedings shall be treated as it were, in the case or proceedings pending in the High Court, a provision of the Rules of the High Court 1980.* (emphasis added)

Having established the nexus between the said application, the stay application and the relevant legal provisions therein, I am of the view that this court can rely on the case of *Harkness*. I therefore can agree with the learned counsel for the petitioner that the said application is a "proceeding". However I beg to differ from the learned counsel that the court order of 18 September 1999 in respect of the stay application would stay all proceedings and no further proceedings can be taken.

It is important at this juncture to take stock of the nature and effect of a stay of proceedings. In *Halsbury's Laws Of England*, 4th edn, vol. 37, para 437 states "A stay of proceedings arises under an order of the court which puts a stop or "stay" on the further conduct of the proceedings in that court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings." However para 438 of *Halsbury*'s states, "*A stay of proceedings is not the equivalent of a judgment or of a discontinuance, and may be removed if proper grounds are shown, even if the stay is imposed by a consent order.* In contrast with a judgment for the defendant or the dismissal or discontinuance of an action, *in the case*

of stay of proceedings, whether conditional or absolute, the action still subsists; is still "pending", and the stay is therefore always potentially capable of being removed." (emphasis added) The principle is echoed in the statement of law in the Malaysian Court Forms in Civil Proceedings (23007) cited by the learned counsel for the co-respondent.

In *ROFA Sport Management AG & Anor. v. DHL International (UK) Ltd & Anor*. [1989] 2 All ER 743, ROFA (plaintiffs) held exclusive rights to appoint companies as official suppliers and sponsors of the 1986 FIFA World Cup. Sport-Billy (the licensor) held exclusive commercial rights relating to all marks and designs of FIFA. DHL (defendant) claimed to be entitled to describe itself as the 'Official Worldwide Courier to the FIFA World Cup 1986' under a license granted by Sport-Billy. By a writ and summons issued on 26 July 1985 ROFA sought to restrain the DHL from using the description 'Official Worldwide Courier to the FIFA World Cup 1986'. Sport-Billy heard about the action and informed the ROFA that they intended to apply to be joined as co-defendants, but before they had taken any formal steps to be joined a settlement was reached between the ROFA and DHL which was embodied in a consent order dated 14 August 1985 staying the proceedings. Sport-Billy issued a summons applying to intervene pursuant to RSC O. 15 r. 6(2). ROFA resisted the application on the ground that there was no action in existence after 14 August 1985 and the court had no jurisdiction to entertain Sport-Billy's application. The master and on appeal the judge held that a stay was not the same as a dismissal or discontinuance and ordered Sport-Billy to be joined. ROFA appealed against the order.

In dismissing the appeal, the Court of Appeal held, "An action which had been stayed, even though an order of the court was required before it could proceed further, was nevertheless still technically in being and was to be distinguished from an action which had been discontinued or dismissed and which was incapable of being revived. The consent order of 14 August 1985 embodying the settlement between the plaintiffs and the defendant was in effect a stay of the action, and was expressed to be so, and therefore the court had jurisdiction to entertain the application of the licensor to be joined pursuant to RSC O. 15 r. 6(2)."

RSC O. 15 r. 6(2) referred to in the case of *ROFA (supra)* is similar to our O. 15 r. 6(2) of the RHC. Although that case concerned an application for joinder under RSC O. 15 r. 6(2)(b) whereas in the present case, the application is for an order that a person ceased to be a party under O. 15 r. 6(2)(a) of the RHC, I agree with the learned counsel for the late co-respondent that the principle propounded in *ROFA*'s case is applicable as an analogy can be drawn.

This means that although there is a stay of proceedings *vide* the court order of 18 September 1999, yet the court has the jurisdiction to entertain the application of the administrator of the estate of the co-respondent to strike out the name of the co-respondent under O. 15 r. 6(2)(a) of the RHC.

Further, I agree with the learned counsel for the late co-respondent that the court order of 18 September 1999 unequivocally states that the action be stayed until the respondent, and not the co-respondent, pay the necessary costs to the petitioner. Therefore the stay of proceedings is operative only as against the respondent *per se* and the administrator of the estate of the co-respondent is not precluded from applying to strike out the name of the co-respondent from the divorce petition.

For all the foregoing reasons, the preliminary point raised by the petitioner as per the said application is dismissed with costs.